

REMARKS

The present Amendment is in response to the Official Action mailed June 9, 2008. Claims 1 and 2 have been amended, claims 7-22 and 24 have been previously canceled, and claims 33-38 are new. Thus, claims 1-6, 23, and 25-38 are currently pending in the present case. The following sets forth Applicants' remarks pertaining to the currently pending claims and the outstanding Action.

In the Action, the Examiner first objected to the drawings under 37 C.F.R. § 1.83(a) and rejected claims 1-6, 23, and 25-32 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Applicants believe both to have been put forth by the Examiner for similar reasons. Specifically, the Examiner asserted in the Action that neither the drawings nor the originally filed specification support the limitation that the entire first and second intermediate flanges of the claimed assembly be offset to different sides of the midline in the spine. The Examiner did note that the specification discusses such flanges as being offset from the midline, but because such did not specify which midline, the Examiner has therefore taken such limitation to mean the midline of the device. Applicants do not necessarily disagree with the Examiner's assertions, but do comment that is clear from the structure of the assembly shown in the drawings that upon implantation of same, the intermediate flanges would indeed be offset to the sides of the midline of the spine. However, in the interest of expediting prosecution, Applicants have amended independent claims 1 and 2 to refer to the midline of the assembly, as opposed to the spinal column. Likewise, new claims 33 and 34 similarly require the intermediate flanges to be offset with regard to the midline of the assembly. Applicants respectfully submit that the amendments of claims 1

and 2 overcome both the objections of the drawings and the '112 rejections set forth in the Action.

Further in the Action, the Examiner rejected claim 1 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 6,395,030 to Songer et al. ("Songer"), and claims 2-6 under 35 U.S.C. § 103(a) as being obvious over Songer. Essentially, the Examiner is of the opinion that Songer teaches each and every one of the limitations of previously presented independent claim 1, and that certain additional limitations set forth in claims 2-6, which are not specifically taught by Songer, would have been obvious to one of ordinary skill in the art at the time of the present invention in view of Songer alone. The Examiner provided annotated copies of FIGS. 3 and 4 of Songer in the Action, with the annotations pointing to elements the Examiner believes meet certain limitations of the previously presented claims.

Applicants take the opportunity here to reiterate the above discussion pertaining to the amendments of claims 1 and 2 (as well as similar limitations set forth in new claims 33 and 34) which require that the entirety of the first and second intermediate flanges be offset to one side of the midline of the assembly. It appears as though when setting forth the anticipatory and obviousness rejections of the previously presented claims in view of Songer, the Examiner cited such reference as showing intermediate flanges which were entirely offset to one side of the *spinal* midline. This is due to the fact that the device of Songer is meant to be placed in the spine from a direction on either side of the midline of the spinal column. However, such is not the case with the present invention, which teaches a device meant to be placed from an anterior aspect that includes intermediate flanges which do not conflict with one another when placed against a single vertebral body. The currently pending claims now recite these

intermediate flanges as being offset with respect to the midline of the device, something clearly not taught by Songer. Therefore, in light of the above amendments, Applicants respectfully submit that the currently pending claims define over the Songer reference, and therefore the rejections under § 102(b) and § 103(a) should be removed.

Moreover, Applicants take the opportunity to note that the figures reprinted from Songer in the Action indeed relate to two separate embodiments. The Examiner's reliance upon FIG. 3 as showing certain of the limitations of the currently pending claims, and FIG. 4 for other of the limitations of the currently pending claims, is simply not proper, as such figures refer to completely different devices in Songer. In particular, Applicants point out the Examiner's use of element 46 as teaching an insertion plate for engaging the first and second members shown in FIG. 3 of Songer. Clearly, this is not the case. Rather, plate 46 is meant for attachment to plates 20A and 22A, which each engage a single vertebral body. There is simply no mention of plate 46 being utilized in placing plates 20A and 22A between the vertebral bodies. On the contrary, it would appear from a reading of the specification of Songer that plates 20A and 22A would be first placed against the vertebral bodies (with tubular cage 12A placed therebetween) and plate 46 thereafter attached to the two plates. Thus, Applicants respectfully submit that the aim of the invention of Songer is very different than that of the present case.

Moreover, Applicants note here that subsequent to receiving the outstanding Action, a telephone call was placed to the Examiner by Applicants' undersigned counsel. Applicants' counsel inquired as to the lack of § 102 and 103 rejections of claims 23 and 25-32. In that discussion, the Examiner indicated that while he could not find prior art to either anticipate or obviate those claims, he could not note them as allowable

because of the aforementioned § 112, first paragraph rejections discussed above. Because such rejections have been overcome in the present response, Applicants respectfully submit that claims 23 and 25-32 clearly constitute allowable subject matter. New independent claim 33 has been added with all of the limitations of claims 1 and 23 therein. As such, that claim should also be allowable. Likewise, its dependent claims (i.e. claims 34-38) should also constitute allowable subject matter.

Finally, Applicants wish to address a reference which was noted in the "Notice of References Cited" section of the outstanding Action, but not applied to any of the claims, i.e., U.S. Patent Application Publication No. 2007/0213820 to Majerle et al. ("Majerle"). Applicants respectfully submit that the Majerle reference is not a prior art reference to the present case. Majerle relies upon a PCT application filed April 23, 2004 which in turn claims priority to an EP application filed on April 23, 2003. The EP patent which Majerle claims priority to was only first published on October 27, 2004, which is later than the February 18, 2004 filing date of the present application. Likewise, the PCT application was filed almost two months later than the present case, and when it published, it did so in a language other than English. Thus, the earliest date Majerle qualified as prior art is subsequent to the filing of the present case. As such, Applicants respectfully submit that Majerle does not qualify as prior art to this case.

In light of all of the above, Applicants respectfully request allowance of each and every one of the currently pending claims. Although not specifically discussed herein, the dependent claims also constitute allowable subject matter based upon their dependence from one of independent claims 1 or 33, or an intervening claim. Moreover, such dependent claims may indeed include subject matter separately patentable from the

base claims, and Applicants reserve the right to argue such at a later date (if necessary).

As it is believed that all of the rejections set forth in the Official Action have been fully met, favorable reconsideration and allowance are earnestly solicited. If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: November 20, 2008

Respectfully submitted,

By 

Kevin M. Kocun

Registration No.: 54,230

LERNER, DAVID, LITTENBERG,

KRUMHOLZ & MENTLIK, LLP

600 South Avenue West

Westfield, New Jersey 07090

(908) 654-5000

Attorney for Applicants